IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 478

WEST POINT WHOLESALE GROCERY COMPANY,

APPELLANT

VS.

THE CITY OF OPELIKA, ALABAMA

APPELLEE

APPEAL FROM THE COURT OF APPEALS OF ALABAMA

MOTION OF APPELLEE TO DISMISS

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INDEX

TABLE OF AUTHORITIES

Cases

STATUTE

ORDINANCES OF THE CITY OF OPELIKA, ALABAMA

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Appellee, The City of Opelika, Alabama, pursuant to Rule 16-1(B) of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds:

(a) That the appeal does not present a substantial Federal question; and

(b) That, in part, the Federal questions sought to be raised were not timely or properly raised or expressly passed on by the Court below.

STATEMENT OF CASE.

FACTS

The Appellant, West Point Wholesale Grocery Company, filed its complaint against the Appellee, The City of Opelika, Alabama, in the Circuit Court of Lee County, Alabama, for the recovery of a license tax paid by it to the Appellee in the year 1953. The complaint alleges, in substance, that the Appellant was a resident of the State of Georgia, engaged in the wholesale grocery business, and that all business done in the State of Alabama and in the City of Opelika, was upon orders accepted in West Point, Georgia, and loaded on its trucks there and transported in trucks to Opelika and unloaded at retail merchants places of business at the end of a continuous movement in interstate commerce.

The complaint further alleges that in January, 1953, Appellee had in effect three license tax schedules. The first schedule imposed a license tax on wholesale merchants, based on a graduated schedule, the amount of the tax being determined by the gross receipts, the same being Section 82 of the City License Ordinance. The

second schedule imposed a flat license tax of $100.00 per annum on all transient or itinerant wholesalers other than those engaged in the wholesale grocery business, the same being Section 130 of said Ordinance. The third license schedule imposed a flat license tax of $250.00 per annum on transient or itinerant wholesale grocers, the same being 130 (a) of said Ordinance. The latter schedule reads as follows:

> "130 (a) Transient or Itinerant-Wholesale Grocers:
>
> "Each person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ..... $250.00."

The license tax in the sum of $250.00 was paid by the Appellant and this suit is brought for the recovery of the same. The license tax is alleged to be invalid on the grounds that:

(1) The same constitutes an undue burden on interstate commerce and, hence, violates the Commerce Clause of the Constitution;

(2) That the same discriminated between interstate commerce and intrastate commerce and violates the Commerce, Equal Protection and Due Process Clauses;

(3) That the license tax discriminates against wholesale grocers in that it differentiates between wholesale grocers and other wholesale merchants, and thus violates the Commerce, Equal Protection and Due Process Clauses.

The Appellee filed its demurrer to the complaint, the pertinent portions of the demurrer reading as follows:

"3. The allegations in the plaintiff's complaint that 'the deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of Columbus in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce', is a mere conclusion of the pleader.

"4. It appears from the plaintiff's complaint that the plaintiff is seeking to recover the amount paid by it to defendant as a license, under certain provisions of defendant's license Schedule for 1953, on the ground that the provisions of the said License Schedule under which plaintiff paid the money to defendant, imposed an undue burden upon interstate commerce, whereas, it affirmatively appears from the allegations in the complaint that the acts done by plaintiff, and the business engaged in by the plaintiff, for which plaintiff paid the license fee sought to be recovered, constitute intrastate commerce and not interstate commerce.

"5. For aught that appears from the plaintiff's complaint, the amount of the license provided and imposed upon the plaintiff by the sections of the defendant's City License Schedule for 1953, men-

tioned in the complaint, was not in excess of the license fee for any other exhibition, trade, business or occupation of the same class.

"6. The plaintiff's complaint seeks to recover from defendant a certain sum of money alleged to have been paid by defendant as a license fee or tax for 1953 under defendant's City License Schedule for 1953, and alleges that the provisions of the License Schedule or ordinance, under which plaintiff so paid such money, are illegal and void in that same are arbitrary, unreasonable and discriminatory, whereas, for aught that appears from the allegations in the complaint the ordinance in question does not impose an undue burden upon interstate commerce, designates a reasonable basis for classification, and that the levy applies equally to all within the same class and imposes a like tax upon all who engage in the vocation or who may exercise the privilege taxed."

The demurrer was sustained by the Circuit Court. The judgment of the Circuit Court reading, in part, as follows:

"It is therefore considered, ordered and adjudged by the Court that the demurrer of the defendant filed to the complaint in this cause be and the same is hereby sustained."

The judgment of the Circuit Court of Lee County, Alabama, was affirmed by the Court of Appeals of Alabama, and certiorari was denied by the Supreme Court of Alabama. The decision of the Court of Appeals of Alabama is reported in 87 So. Rep. 2d. Series, page 661, et. seq.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Briefly stated, the questions presented by the Appellant are whether:

1. An annual flat sum license tax levied by the City of Opelika upon persons, firms or corporations delivering groceries at wholesale in the City of Opelika, from a point without the City, violated the Commerce Clause of the United States Constitution.

2. Whether the license tax of the City of Opelika levying a flat sum license on wholesale merchants who unload or deliver groceries at wholesale in the City of Opelika, Alabama, violates the Commerce, Equal Protection and Due Process Clauses, since the license tax levied against wholesalers in said City for groceries transported from a point within the City is based on a graduated amount according to the gross receipts of the local business.

3. Whether one classification for wholesale grocers and another classification for other wholesalers for license tax purposes is a discrimination in violation of the Equal Protection and Due Process Clauses of the Constitution.

The first question raised has been conclusively decided by this Court in the cases of *McGoldrick vs. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565; *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823. As will be discussed later, questions (2) and (3) were not properly raised and passed on by the Court below.

1. Ordinance No. 130(a) does not violate the Commerce Clause of the Constitution. The law is now well

settled that a State may levy a valid tax at the point of delivery on goods shipped in interstate commerce and such a tax does not violate the Commerce Clause of the Constitution of the United States.

The Appellant apparently relies upon the so-called "drummer cases" (*Robbins vs. Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694) but the tax here is levied on the sale and delivery of goods and not upon the solicitation. In the *McGoldrick case, supra*, the Court said:

> "The rule of *Robbins vs. Shelby County Taxing District, supra,* has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

THAT IN PART THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NOT TIMELY OR PROPERLY RAISED OR EXPRESSLY PASSED ON BY THE COURT BELOW.

2. Whether Ordinance No. 130(a) violates the Commerce, Equal Protection and Due Process Clauses of the Constitution has not been properly raised or expressly passed on by the Court below. The matter presented in the Court below was a question of pleading and the facts have never been presented to or passed on by the Courts of Alabama. It is not disputed that the demurrer admits the truth of all facts well pleaded. It is equally well settled that the demurrer does not admit either conclusions of law or conclusions of fact. *Southern Liquid Gas Co. vs. City of Dothan*, 44 So. 2d. 744, 253 Ala. 350; *Groover v. Darden*, 68 So. 2d. 28; *Sing-*

er Sewing Machine Co. v. Teasley, 73 So. 969, 198 Ala. 673.

The complaint contains the following allegation:

> "Plaintiff further alleges that the aforesaid deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of West Point in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce."

Ground 3 of the demurrer aptly challenges the sufficiency of this allegation. The allegation is based in its entirety on the theory that the license constitutes an undue burden on interstate commerce and no question of discrimination is raised. Under the decision in the *McGoldrick case, supra*, the allegation is plainly an erroneous conclusion of law and on this ground the demurrer was properly sustained.

The judgment of the Circuit Court of Lee County, Alabama, sustained the demurrer and did not specify the grounds upon which it was sustained:

> "A demurrer is an entity and if any ground is well taken the action of the trial court in sustaining the demurrer must be upheld." *Prather v. Ray*, 61 So. 2d. 46, 258 Ala. 106; *Rudder v. Trice*, 182 So. 22, 236 Ala. 234; *Fife v. Pioneer Lumber Company*, 185 So. 759, 237 Ala. 92.

The judgment of the Trial Court might well have been sustained by the Court of Appeals of Alabama on this ground alone.

The Supreme Court of Alabama has repeatedly held that there is a presumption that the acts and ordinances of a legislative body are reasonable and valid and that the burden is upon one who assails such acts or ordinances to overcome this presumption. *American Bakeries v. City of Huntsville*, 168 So. 880-883, 232 Ala. 612; *City of Troy v. Western Union Telegraph Co.*, 51 So. 523, 164 Ala. 482, 27 L. R. A. 627; *Van Hook v. City of Selma*, 70 Ala. 361.

A corollary of this rule is that a complaint attacking the license ordinance must aver the facts to support the conclusion of the pleader. The allegation of discrimination is a conclusion of the pleader and is fatally defective on demurrer for failure to allege the facts to support the conclusion. *Southern Liquid Gas Co., v. City of Dothan*, 44 So. 2d. 744, 253 Ala. 350; *American Bakeries Co. v. City of Huntsville*, 168 So. 880, 232 Ala. 612.

Grounds 4, 5 and 6 of the demurrer presented this question of pleading and were sustained in the Lower Court and in the Court of Appeals of Alabama. The question of whether the ordinance is discriminatory is a question of fact and this question of fact has not been passed upon by the Court below. The Court below has only determined the question of pleading in accordance with the laws of practice and procedure in the State of Alabama. We quote from the dissenting opinion in *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 596, as follows:

"I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actual operation should be required to come forward with proof to sustain the charge. See *Southern Railway Co. v. King*, 217 U. S. 524, 534-537, 30 S. Ct. 594, 596, 597, 54 L. Ed. 868. This does not, of course, require proof of the obvious. But as Mr. Justice Brandeis pointed out, cases of this type should not be decided on the basis of speculation; the special facts and circumstances will often be decisive. *City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 170-172, 48 S. Ct. 66, 68, 69, 72 L. Ed. 218. Without evidence and findings we frequently can have no 'sure basis' for the informed judgment that is necessary for decision. *Terminal Railroad Assoc. v. Brotherhood*, 318, U. S. 1, 8, 63 S. Ct. 420, 424, 87 L. Ed. 571."

3. Whether one classification for wholesale grocers and another classification for other wholesalers for license tax purposes is a discrimination in violation of the Equal Protection and Due Process Clauses of the Constitution, was not properly raised or expressly passed on in the Court below.

The pleadings do not allege facts showing that the classification of wholesale grocers in one category and the classification of other wholesalers in a different category constitutes an unreasonable classification rendering the ordinance invalid. Under Title 37, Section 735, of the Alabama Code of 1940, the power is conferred on municipal corporations to license business, trades and professions in the exercise of the police power as well as for the purpose of raising revenue, either or both. This necessarily permits the classification of va-

rious businesses for license tax purposes. The exercise of the police power is obvious and justifies the classification. A wholesale grocer deals with food for human beings, with incident health and sanitary regulation under the police power. The provisions of the ordinance apply to every itinerant or transient wholesale grocer and in this respect there is no discrimination or inequality. It is well settled that a schedule of licenses may prescribe different license taxes for different types of businesses and professions. *American Bakeries Company v. City of Huntsville, supra; City of Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67; *Dozier v. State*, 46 So. 9, 154 Ala. 83; *Phoenix Carpet Co. v. State*, 22 So. 627; *American Bakeries Co. v. City of Opelika*, 157 So. 206, 229 Ala. 388.

Here again, the question of pleading is presented. The burden rests with the Appellant to allege in its complaint facts showing that the classification is discriminatory. No such facts are alleged and the demurrer was properly sustained to this aspect of the complaint. The allegation of discrimination is a conclusion of the pleader and the Court below has not passed upon the question of fact here sought to be presented.

CONCLUSION

Appellee respectfully submits that the power of a State to levy a valid tax on goods shipped in interstate commerce, at the point of delivery, has been clearly, expressly and finally determined by the decisions of this Court, and, hence, no substantial Federal question is presented as to this aspect of the appeal. The Courts below have not determined as a matter of fact that the license tax either violates or does not violate the Com-

merce, Equal Protection and Due Process Clauses of the Constitution. The Courts below have only passed on and decided the question of pleadings presented by the complaint and the demurrer thereto and have not expressly passed on the matters of fact which determine the validity of the license tax in question. We respectfully submit that the appeal should be dismissed.

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PROOF OF SERVICE

I, Lawrence K. Andrews, Counsel of Record for the Appellee, City of Opelika, Alabama, hereby certify that I have served a copy of the foregoing Motion to Dismiss on the Honorable M. R. Schlesinger, 1700 N. B. C. Building, Cleveland, Ohio, Counsel of Record for the Appellant, by depositing a copy of the same in the United States Postoffice at Union Springs, Alabama, first class mail, with postage prepaid, addressed to him at his said Postoffice address.

Witness my hand this the 23 day of October, 1956.

Lawrence K. Andrews

Counsel of Record for Appellee